



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II  
Attorney General

April 26, 2011

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7-1-1

**Via UPS Overnight Delivery**

Mary E. Gust, Director  
Administrative Actions and Appeals Service Group  
U.S. Department of Education  
Federal Student Aid / Program Compliance  
830 First Street, NE – UCP-3, Room 84F2  
Washington, DC 20002-8019

Dear Ms. Gust:

This office represents all state agencies and institutions of the Commonwealth of Virginia. On behalf of Virginia Polytechnic Institute and State University ("Virginia Tech"), I am writing this letter as a formal appeal of your letter dated March 29, 2011, addressed to Dr. Charles Steger, in which the Department levied a fine totaling \$55,000 against Virginia Tech. Pursuant to 34 C.F.R. § 668.84(b)(iii) Virginia Tech also hereby requests a hearing before a hearing official at which time evidence on the part of both Virginia Tech and the Department of Education may be presented.

On January 14, 2011, pursuant to 34 C.F.R. § 668, Subpart H, Virginia Tech filed an appeal of the Department's December 9, 2010, Final Program Review Determination ("FPRD"). By letter dated March 16, 2011, James W. Runcie refused to docket Virginia Tech's appeal because at that time no monetary fine had been imposed and there was "...no adverse action to be challenged." Since the Department has now levied a fine, this appeal additionally addresses errors contained in the FPRD since the Department has identified those matters as constituting its basis for levying the fine. Furthermore, Virginia Tech continues to object to the failure to docket its appeal pursuant to 34 C.F.R. § 668, Subpart H.

## STATEMENT OF FACTS

As the world knows, on the morning of April 16, 2007, horrific events occurred on the Virginia Tech campus. It is also now known that Seung-Hui Cho ("Cho") murdered two students in a dormitory room early that morning. The identity of the shooter was not known until much later. The dormitory shooting appeared to be an isolated event.

The shooting occurred at approximately 7:15 a.m., and police responded quickly thereafter. Upon arriving at the scene, the police found that a female student had been critically wounded and that a male student had been killed. The male was clad only in his boxer shorts. The police investigation immediately revealed that the boyfriend of the female student had been on campus earlier in the morning and he had an interest in guns. The boyfriend's car was not on campus. Based on their investigation, the police concluded that the boyfriend was a person of interest and he had left the campus.

The Virginia Tech police had requested assistance from the State Police and the Town of Blacksburg Police Department immediately upon learning of the shootings in the residence hall. The Chief of Police notified the President of the institution at 8:10 a.m. of the situation. At that point, the President was advised also that law enforcement consensus was that the event was isolated and that the campus did not need to be closed. The President called a meeting of his senior staff and after gathering pertinent information, a notification about the dormitory shooting was issued to the campus.

### **SCOPE OF APPEAL**

We know today that Cho was planning something even more destructive than the shooting in the residence hall. Approximately two and a half hours later, Cho opened gun fire in a classroom building killing 30 students and faculty, injuring 27 others and then killing himself. It is acknowledged that this tragedy continues to affect the lives of the victims, their families and Virginia Tech. The events of that day remain incomprehensible; however, Virginia Tech's actions in response to the seemingly isolated, targeted shooting prior to the unforeseeable and unprecedented shootings more than two hours later at a different location do not warrant punishing Virginia Tech through the issuance of the FPRD and levying a fine.

Security on Campus, Inc., issued a press release on August 20, 2007, stating that it had filed a complaint with the Department of Education alleging that Virginia Tech had violated the Clery Act with respect to the campus notification made on the morning of April 16, 2007. It is important to note that at no time prior to August 20 had the Department contacted Virginia Tech about its notification. On September 4, 2007, the Department formally notified Virginia Tech that it was commencing a program review, and it sought limited Clery Act documentation such as the University's annual security reports. Virginia Tech responded in October 2007 to the request.

Without seeking any input from Virginia Tech about the events that transpired on April 16, 2007, nor even contacting Virginia Tech for a period in excess of two years, the Department issued its preliminary Program Review Determination ("PRD") on January 21, 2010. Virginia Tech was given until April 20, 2010, to submit a written response to the preliminary findings. The Department took an additional eight months and issued its FPRD on December 9, 2010.

By letter dated December 9, 2010, Nancy Paula Gifford forwarded to Virginia Tech the Department of Education's FPRD regarding its "...off-site focused program review of Virginia Polytechnic Institute and State University's...compliance with ...the

Clery Act.” The review was limited to Virginia Tech’s compliance with the “timely warning” provision of the Clery Act on the morning of April 16, 2007. In conclusion, the FPRD set forth two findings of non-compliance:

1. “(T)he warnings that were issued by the University were not prepared or disseminated in a manner to give clear and timely notice of the threat to the health and safety of campus community members.”
2. “Virginia Tech did not follow its own policy for the issuance of timely warnings as published in its annual security reports.”

It is Virginia Tech’s position that the two findings against Virginia Tech in the FPRD are arbitrary and capricious and not supported by either the evidence or the law. Had a decision been based on the evidence or then applicable notification standards, the Department would not have levied the fine imposed by your letter and, therefore, it is Virginia Tech’s position that the decision to impose the fine was arbitrary and capricious as well.<sup>1</sup> In support of this appeal Virginia Tech places primary reliance on its response and accompanying exhibits it submitted to the Department of Education on April 20, 2010.

### **POINTS ON APPEAL**

#### **I. Virginia Tech has not been afforded due process in the Department of Education’s review of the complaint filed against it.**

At no time has the Department shared any evidence with Virginia Tech that the Department collected as part of its review. This failure made it impossible to address adequately the preliminary Program Review Determination. Further, this failure means that Virginia Tech is unable to respond fully to the issues addressed in the FPRD.

In the FPRD, reference is made to documentary evidence, opinion pieces, and other submissions shared by Security on Campus and family members of the victims of the April 16, 2007, shootings with the Department of Education. Virginia Tech requested these source materials three times during the DOE review process pursuant to the Freedom of Information Act, and initially the requests were denied. (See Attachment A) After a formal FOIA request was made on December 10, 2010, Virginia Tech received an email response from Kimberly Small stating that the Department needed an extension to respond until January 13, 2011. (See Attachment B) A second email indicated another delay was necessary. (See Attachment C) To date, the Department has failed to provide any of the requested information, even though the Freedom of Information Act requires a response within 20 days. 5 U.S.C.A. § 552.

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<sup>1</sup> This appeal raises critical issues not only for Virginia Tech, but for all institutions of higher education. The Clery Act, 20 U.S.C.A. 1092(f) is important legislation designed to assist students and employees by requiring notifications about criminal activity on campus which pose a continuing threat. Regrettably, the FPRD provides no clear guidance to any of these institutions as they strive to comply with the law in the future.

Virginia Tech renewed its FOIA request on March 22, 2011, and as with the other requests, no documents have been provided. (See Attachment D)

The submissions of Security on Campus and the family members of the shootings are particularly important to Virginia Tech's defense on appeal since at no time did the Department of Education's investigator interview any Virginia Tech personnel involved in the decisions made on April 16, 2007. However, from the FPRD, it appears that the Department's investigator relied on third-party recollections of statements made by University Administrators during meetings with family members in reaching conclusions adverse to Virginia Tech. See, for example, the initial Program Review Report, January 21, 2010, page 6, third complete paragraph. Such hearsay statements cannot be considered reliable, especially when accurate information can be obtained from parties to the conversation in question. In addition, Virginia Tech does not concede the accuracy of the statements and needs to be able to conduct its own thorough analysis before responding to the Department on any factual assertions based on the third-party submissions. An essential element of due process is knowing the allegations upon which DOE relies in making a finding against Virginia Tech. See, e.g., Weeden v. Town of Clyde Hill, 947 F.2d 952 (9<sup>th</sup> Cir. 1991).

Furthermore, Virginia Tech has not had an adequate opportunity to defend itself in front of the Department. The failure to interview Virginia Tech personnel calls into question the accuracy of the conclusions reached in the FPRD. While Virginia Tech was permitted to provide a point-by-point written refutation of the FPRD, no full explanation was sought by DOE as to the actions taken by Virginia Tech administrators on that fateful morning. The opportunity to be heard is also an essential element of due process. See Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970).

## **II. Timely Warning.**

A. Virginia Tech appeals the conclusion in the FPRD that the notification it issued the morning of April 16, 2007, was not timely and accurately prepared, as a clearly erroneous finding. Because this finding was erroneous, no fine should have been imposed. The Department's regulations implementing the Clery Act, 34 C.F.R. § 668.46(c) contain the only description of timely warning. The standard for timely warning in the cited section is vague at best and leaves discretion to an institution in both the timing and content of any warnings. The difficulty in the case at hand is that the FPRD imposes a standard that Virginia Tech was expected to meet that is based on after-the-fact knowledge. In essence, in its FPRD, the Department was engaged in "hindsight bias." What is known today about the mass shooting later in the day was not known at the time that Virginia Tech issued its campus notice, and only those facts known at the time the notification was issued should have been considered by the Department in its review of the University. Based on the events known at the time, the notification that was actually sent met any reasonableness standard envisioned by the Clery Act since it is not clear under the law that any notice was required. Certainly, the notice was well within the orbit of discretion left by the law to an institution.

B. On the morning of April 16, 2007, the campus law enforcement and University Administrators knew that a shooting had occurred in the West Ambler Johnson (WAJ) residence hall on the Virginia Tech Campus at approximately 7:15 a.m. It must be emphasized that in 2007 the regulations only required a timely warning in those situations in which there appeared to be an ongoing threat to the campus. At the time Virginia Tech issued its notification, the police had no evidence indicating the requisite on-going threat to the campus. The FPRD finding that Virginia Tech's notification was neither timely nor accurate is based on what happened later in the day. The Department's after-the-fact determination is not supported by the Clery Act, the accompanying regulations, or the administrative assistance in the form of the 2005 Clery Handbook issued by the Department of Education. Further, the Department's finding is not consistent with numerous other notices issued by different universities, which have not been cited by the Department as a violation of Clery.

Key to this appeal is the language of the Clery Act which provides that "each institution... shall make timely reports to the campus community on crimes considered to be a threat to other students and employees... that are reported to campus ... police .... Such reports shall be provided to students and employees in a manner that is timely and will aid in the prevention of similar occurrences." 20 U.S.C. §1812(b)(3). (Emphasis added). See also, 34 C.F.R §668.46(e)(1)(iii). The quoted language clearly requires the exercise of judgment on the part of the institution. Nothing in the statute, rules or regulations authorizes the Department to substitute after-the-fact events for the institution's reasoned judgment based on the situation as it existed at the time a notification was issued. 34 C.F.R. § 668.46(e)(1)(iii). See also, The 2005 Handbook for Campus Crime Reporting, at p.61.

On April 16, 2007, a terrible event occurred at Virginia Tech in the early morning, a shooting of two students in a particular fourth-floor room of a multi-story dormitory. One student was dead, and the other was seriously injured and later died. Had the Department of Education interviewed the police who investigated the scene early in the morning, the Department would have learned that the police had concluded that the perpetrator had fled the scene of the crime and had so advised the President of Virginia Tech. As in virtually all murder investigations, police would have no reason to suspect that the perpetrator would do anything other than flee the scene of the crime. No evidence on the scene or collected afterward gave indication of a current threat to the university community. Because there was no evidence of an ongoing threat to the campus, no warning was required.

C. Even assuming a warning was required, the e-mail notification sent by Virginia Tech was timely by the standard followed by institutions of higher education in April 2007. As Virginia Tech stated in its response to the initial PRD, the Department, in its PRD, and subsequently in its FPRD, has imposed on Virginia Tech a warning standard that did not exist in 2007. As a result of the shooting on the Virginia Tech campus, Congress amended the Clery Act in the 2008 Higher Education Opportunity Act (Public Law 110-315 (August 14, 2008)). Subsequently, in 2009, the DOE promulgated rules related to this change which became effective on July 1, 2010. 34

C.F.R. § 668.46. The law as it existed in 2007 did not contain the emergency notification language that exists today. In essence, by requiring a notification in a time frame faster than that met by Virginia Tech, the Department is applying to Virginia Tech the emergency notification requirement that now exists in the law but did not exist in 2007. The Department did not use the term emergency notification in its FPRD, but nonetheless we believe the Department is attempting, consciously or unconsciously, to apply this new legal requirement retroactively. Virginia Tech should not be held to the emergency notification standard that did not exist in April 2007, and the Department of Education is clearly wrong in so holding. As the District of Columbia Circuit Court has found, “generally an agency may not promulgate retroactive rules without express Congressional authorization.” Arkema, Inc., v. Environmental Protection Agency, 618 F.3d 1, 7 (D.C. Cir. 2010). Nothing in the Higher Education Opportunity Act of 2008 provides for retroactive application of the emergency warning requirement.

D. Virginia Tech concurs with the Department of Education’s finding in the FPRD that the existing law in 2007 provided that whether to issue a warning and when to do so were decisions to be made on a case-by-case basis. However, in reviewing the facts of any given case arising under the applicable standard, the institution should be entitled to consider the precedential guidance issued by the Department in its 2005 Handbook as a best practice. For example, the Department’s own guidance shows that a timely warning, prior to 2007, was to be measured in days, rather than hours. See, The Handbook for Campus Crime Reportings, published in 2005, p.65. To impose an after-the-fact standard on Virginia Tech that requires a warning in minutes clearly is erroneous. Examples of warnings issued by other institutions of higher education, and the timing of those warnings, all slower than the speed at which Virginia Tech issued its notification, were cited in Virginia Tech’s response to the PRD and are incorporated into this appeal by reference. In each case, Virginia Tech’s notification was faster than the other schools. These examples provide persuasive evidence of institutional best practices in 2007 and demonstrate that the Department’s decision in this case was based more on the subsequent mass murder on April 16, 2007, than any actual, reasoned legal requirement based on the facts of the situation as presented to police and university administrators after the initial, apparently isolated dormitory shooting.

The Department of Education fails to recognize the language in 65 C.F.R. § 68.46(e) in another material respect. The FPRD only focused on the campus wide e-mail issued by Virginia Tech and found that to be insufficient as a timely warning. However, the regulatory language leaves to the discretion of the campus the manner in which any warning is to be made. The Department has ignored the door-to-door notifications made by the Residence Hall Staff in the residence hall immediately following the early morning shootings. Such personal contact clearly constituted a further notification. During the early morning hours, contrary to what the world knows today, there was no indication of a campus-wide danger. The failure to acknowledge the sufficiency of such targeted notifications in the residence hall was clearly erroneous on the part of the Department.

For the reasons cited herein, Virginia Tech is appealing the findings and the fine related to the notification it issued on the morning of April 16, 2007.

### **III. Compliance with Internal Virginia Tech Policies**

Virginia Tech appeals the finding in the FPRD that it failed to comply with its own policies on issuing timely warnings. Because this finding was erroneous, no fine should have been imposed. Virginia Tech's policy met the requirements of 34 C. F. R. 668.46(b)(2)(i). This section of the Code of Federal Regulations requires preparation of an Annual Security Report, which the Department acknowledges was done by Virginia Tech. The section further states that the report is to include "(i) policies for making timely warning reports to members of the campus community...." Virginia Tech policies meet this standard today and met the standard in 2007.

Virginia Tech's policy number 5615 clearly provides that "University Relations and the University Police will make the campus community aware of crimes that have occurred and necessitate caution on the part of students and employees, in a timely fashion and in such a way to aid in the prevention of similar occurrences." On April 16, 2007, the Office of University Relations issued the notification at the behest of senior University leadership. Further, the notification was made after the University President consulted with the campus police. For this reason, the Department was clearly erroneous in its determination that Virginia Tech did not comply with its internal policies.

The FPRD conclusions clearly put form over substance. Early in the morning of April 16, 2007, the Virginia Tech Chief of Police and the personnel who report to him were busy investigating the shootings in the campus residence hall. To criticize Virginia Tech for not diverting police personnel from the investigation to compose and issue a campus message is illogical, and such a diversion would have been counterproductive to campus security.

The Department further criticizes Virginia Tech for not including in its policies "elements suggested by the [Department's] Handbook." It is unclear from the FPRD or the letter imposing the fine, whether these omissions were part of the rationale for levying the fine. However, nothing in the federal code nor the accompanying regulations mandates compliance with these "suggestions." The Department fails to cite any authority to impose such requirements after the fact. There is nothing in the Department's Handbook to indicate that these "suggestions" have the force and effect of law, as they have not been adopted in accordance with any sanctioned rule-making process under the Administrative Process Act. See, Central Laborers' Pension Fund v. Heinz, 541 U.S. 739, 124 S. Ct. 2230 (2004). As the United States District Court for the District of Utah has found, "an agency manual, in contrast to a regulation, is not necessarily entitled to the force and effect of law. This is particularly true if the agency did not intend the manual to be mandatory, but rather intended it as a guidance or advisory document," Wildearth Guardians v. United States Fish and Wildlife Service, 622 F. Supp. 2d 1155, 1164 (Utah 2009), citing, Aragon v. United States, 146 F. 3d 819, 824 (10<sup>th</sup> Cir. 1998).



The Department's rationale for citing Virginia Tech for failing to meet the Department's "suggestions" flies in the face of the findings it made with respect to the timely warning issue addressed above. In its 2005 Handbook, the Department offers suggestions for appropriate timely warnings, including examples that clearly show timely warnings were to be measured in days and not hours. See p.65 of the Department's Handbook. The Department ignores the importance of the language in its Handbook with a footnote in the FPRD with the comment that such an example was not relevant to this situation. It is clear that if the Department Handbook suggestions do not apply to the timing of a warning, there is no rational basis for applying any other suggestions in the Handbook.

For the reasons cited herein, Virginia Tech is appealing the fine related to compliance with Virginia Tech policies.

### **CONCLUSION**

Virginia Tech respectfully requests that the findings in the FPRD be reversed and amended as outlined in this appeal. Further, Virginia Tech requests that the fines imposed in your letter be rescinded. Finally, Virginia Tech requests that a hearing officer be appointed to hear Virginia Tech's appeal, at which time the University be allowed to present evidence in support of the points made in this appeal letter.

Respectfully submitted,



E. Duncan Getchell, Jr.  
State Solicitor General



## Smith, Patricia

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**From:** Capaldo, Stephen  
**Sent:** Wednesday, April 20, 2011 10:42 AM  
**To:** Smith, Patricia  
**Subject:** FW: Program Review Report PRCN: 200810326735

**From:** Mulhare, Michael  
**Sent:** Thursday, December 09, 2010 10:40 AM  
**To:** Heidbreder, Kay; Capaldo, Stephen  
**Subject:** FW: Program Review Report PRCN: 200810326735

Information request

Michael J. Mulhare, P.E., Director  
Office of Emergency Management  
Virginia Tech  
248 Burruss Hall (0195)  
Blacksburg, VA 24061

540-231-2438 (office)  
540-449-2179 (mobile)

[mjmulhare@vt.edu](mailto:mjmulhare@vt.edu)

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**From:** Mulhare, Michael  
**Sent:** Tuesday, February 23, 2010 10:37 AM  
**To:** 'Moore, James'  
**Cc:** Heidbreder, Kay  
**Subject:** Program Review Report PRCN: 200810326735

Jim,

Thank you for taking the time to speak with us Friday. As discussed the university is interested in reviewing all Program Review and Final Review Reports or any other administrative actions where the Department of Education has cited a timely warning violation. You indicated that you could provide some assistance in acquiring these documents or direct us to their location.

We also discussed access to information the Department of Education received from other entities, some of this information the Program Review Report states was submitted as recently as December 4, 2009. You articulated in our discussion that Virginia Tech could not have access to this material. The University is requesting that you reconsider this

position. To adequately respond to the Scope of Review and the proffered factual information contained within, as well as to resolve this matter as expeditiously as possible, it is essential that this information be made available for review. Prior to taking a position at Virginia Tech, I spent nearly 25 years employed by a state regulatory agency. During that period I was party to hundreds of administrative as well as criminal proceedings, primarily as the regulator but occasionally as a respondent agency representative. In all those administrative proceedings the respondent was provide some means of access to the case files and information used in developing the administrative action. If copies of the information cannot be provided, I would request that, at a minimum, the university be allowed to schedule a time to review the information at the Department of Education office.

Again, thank you for your assistance.

Mike

Michael J. Mulhare, P.E., Director  
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Virginia Tech  
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Blacksburg, VA 24061

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*It is amazing what you can accomplish if you do not care who gets the credit. Truman*

## Smith, Patricia

---

**From:** Capaldo, Stephen  
**Sent:** Wednesday, April 20, 2011 10:42 AM  
**To:** Smith, Patricia  
**Subject:** FW: Program Review Report PRCN: 200810326735

**Sensitivity:** Confidential

**From:** Mulhare, Michael  
**Sent:** Thursday, December 09, 2010 10:45 AM  
**To:** Heidbreder, Kay; Capaldo, Stephen  
**Subject:** FW: Program Review Report PRCN: 200810326735  
**Sensitivity:** Confidential

Moore response to request for information regarding other DOE actions related to timely warning

Michael J. Mulhare, P.E., Director  
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**From:** Moore, James [mailto:James.Moore@ed.gov]  
**Sent:** Wednesday, March 03, 2010 12:43 PM  
**To:** Mulhare, Michael  
**Subject:** RE: Program Review Report PRCN: 200810326735  
**Sensitivity:** Confidential

Mike:

Hopefully, the weather in VA will just keep getting better. Spring still looks to be a way off here. I will see what I can find on Morehead. That was handled by another office before I even joined the agency. Eastern Michigan should be pretty easy to track down. In all of these cases, the timely warning finding was sustained in the FPRD's. As I have mentioned before, all of these cases occurred at a time when no part of the institutional responses were ever released. Even under the very new law, only certain narrative parts of the response will be released and only then under FOIA subject to redaction, etc. Of course, aspects of the responses are summarized in the reports so again that should give

you some context. I will see what I can find on Morehead, etc. If you find some of these online, please let me know so I can call off the search.

Take care,

Jim

**From:** Mulhare, Michael [mailto:mjmulhar@vt.edu]  
**Sent:** Wednesday, March 03, 2010 12:20 PM  
**To:** Moore, James  
**Cc:** Heidbreder, Kay  
**Subject:** RE: Program Review Report PRCN: 200810326735  
**Sensitivity:** Confidential

Jim,

I think last week's storm was the first one to miss us, I had forgotten how much it impacted Pennsylvania and New Jersey.

My research has indicated that there were four instances where the Department of Education cited "timely warning". These cases were Morehead State University, La Salle University, Salem International University and Eastern Michigan University. Documents that are of interest to Virginia Tech are the Program Review Reports, Final Program Review Reports and responses provided by the these Universities to the Department of Education as well as any additional documents generated as a result of further Department of Education administrative process required to resolve these four cases.

Thank You for your assistance

Mike

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**From:** Moore, James [mailto:James.Moore@ed.gov]  
**Sent:** Tuesday, March 02, 2010 5:36 PM  
**To:** Mulhare, Michael  
**Subject:** RE: Program Review Report PRCN: 200810326735  
**Importance:** High  
**Sensitivity:** Confidential

Good afternoon Mike:

I hope that all is well. Due to bad weather, we were out of the office for a couple of days last week. That delayed my ability to pull reports.

I was able to identify a report or two with timely warning findings. Those will be transmitted to you tomorrow by PDF. In the interest of time, I think it is OK to forego the FOIA request process. These are public documents. Over years, most of the reports were released under FOIA and posted on websites even though none seem to be coming up when I search. Because every case is unique, I am not sure how much the material will assist in crafting VT's response but it may provide some reference point.

As to the work paper issue, I went back through the material that we have. I also checked what we have done in other cases. At this point, there is nothing that we would release to a school or anyone else. If any material were to be released, such a release would only occur at the conclusion of the report, response, final determination process that we discussed. Our report can be read as having one finding with two components or as two separate findings. Either way, there is a timeliness concern and a policy concern. We do not dictate a format for responses other than that the findings are addressed. One option is to refute either or both elements of the timely warning violation. This would be done by taking exception with our initial determinations regarding the timing of events and/or our understanding of VT's policies as presented in the report. In addition to challenging the violation itself and any other information present by us, please also provide some information about any improvements, changes, etc. that VT has implemented or has under development. Most of the information that we reviewed came from the Review Panel's reports and the online records archive.

Also, to allay any concerns about the FOIA issue raised during our call - As far as I know, there has been no change in the Department's position on the release of the report. We are aware that VT has asserted a privilege or exemption that will permits VT to not release the report so that VT can develop its response. I checked again and there doesn't seem to be any exceptions to holding the release of program review reports until the final determination is issued. I will do what I can to make sure that you are kept in the loop if something changes.

Take good care,

Jim

**From:** Mulhare, Michael [mailto:mjmulhar@vt.edu]  
**Sent:** Monday, March 01, 2010 10:38 AM  
**To:** Moore, James  
**Cc:** Heidbreder, Kay  
**Subject:** FW: Program Review Report PRCN: 200810326735

Jim,

I am following up on the attached email. With a relatively short time line for Virginia Tech to respond, it is important for us to know the status of the requests made to your office.

Thank you again for your assistance.

Mike

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Office of Emergency Management  
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Again, thank you for your assistance.

Mike

Michael J. Mulhare, P.E., Director  
Office of Emergency Management  
Virginia Tech  
248 Burruss Hall (0195)  
Blacksburg, VA 24061

540-231-2438 (office)  
540-449-2179 (mobile)

[mjmulhare@vt.edu](mailto:mjmulhare@vt.edu)

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*It is amazing what you can accomplish if you do not care who gets the credit. Truman*



## Smith, Patricia

---

**From:** Capaldo, Stephen  
**Sent:** Wednesday, April 20, 2011 10:42 AM  
**To:** Smith, Patricia  
**Subject:** FW: Program Review Report PRCN: 200810326735

**Importance:** High  
**Sensitivity:** Confidential

**From:** Mulhare, Michael  
**Sent:** Thursday, December 09, 2010 10:43 AM  
**To:** Heidbreder, Kay; Capaldo, Stephen  
**Subject:** FW: Program Review Report PRCN: 200810326735  
**Importance:** High  
**Sensitivity:** Confidential

Moore, response to request

Michael J. Mulhare, P.E., Director  
Office of Emergency Management  
Virginia Tech  
248 Burruss Hall (0195)  
Blacksburg, VA 24061

540-231-2438 (office)  
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**From:** Moore, James [mailto:James.Moore@ed.gov]  
**Sent:** Tuesday, March 02, 2010 5:36 PM  
**To:** Mulhare, Michael  
**Subject:** RE: Program Review Report PRCN: 200810326735  
**Importance:** High  
**Sensitivity:** Confidential

Good afternoon Mike:

I hope that all is well. Due to bad weather, we were out of the office for a couple of days last week. That delayed my ability to pull reports.

I was able to identify a report or two with timely warning findings. Those will be transmitted to you tomorrow by PDF. In the interest of time, I think it is OK to forego the FOIA request process. These are public documents. Over years, most of the reports were released under FOIA and posted on websites even though none seem to be coming up when I search. Because every case is unique, I am not sure how much the material will assist in crafting VT's response but it may provide some reference point.

As to the work paper issue, I went back through the material that we have. I also checked what we have done in other cases. At this point, there is nothing that we would release to a school or anyone else. If any material were to be released, such a release would only occur at the conclusion of the report, response, final determination process that we discussed. Our report can be read as having one finding with two components or as two separate findings. Either way, there is a timeliness concern and a policy concern. We do not dictate a format for responses other than that the findings are addressed. One option is to refute either or both elements of the timely warning violation. This would be done by taking exception with our initial determinations regarding the timing of events and/or our understanding of VT's policies as presented in the report. In addition to challenging the violation itself and any other information present by us, please also provide some information about any improvements, changes, etc. that VT has implemented or has under development. Most of the information that we reviewed came from the Review Panel's reports and the online records archive.

Also, to allay any concerns about the FOIA issue raised during our call - As far as I know, there has been no change in the Department's position on the release of the report. We are aware that VT has asserted a privilege or exemption that will permits VT to not release the report so that VT can develop its response. I checked again and there doesn't seem to be any exceptions to holding the release of program review reports until the final determination is issued. I will do what I can to make sure that you are kept in the loop if something changes.

Take good care,

Jim

**From:** Mulhare, Michael [mailto:mjmulhar@vt.edu]  
**Sent:** Monday, March 01, 2010 10:38 AM  
**To:** Moore, James  
**Cc:** Heidbreder, Kay  
**Subject:** FW: Program Review Report PRCN: 200810326735

Jim,

I am following up on the attached email. With a relatively short time line for Virginia Tech to respond, it is important for us to know the status of the requests made to your office.

Thank you again for your assistance.

Mike

Michael J. Mulhare, P.E., Director  
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Virginia Tech  
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**From:** Mulhare, Michael  
**Sent:** Tuesday, February 23, 2010 10:37 AM  
**To:** 'Moore, James'  
**Cc:** Heidbreder, Kay  
**Subject:** Program Review Report PRCN: 200810326735

Jim,

Thank you for taking the time to speak with us Friday. As discussed the university is interested in reviewing all Program Review and Final Review Reports or any other administrative actions where the Department of Education has cited a timely warning violation. You indicated that you could provide some assistance in acquiring these documents or direct us to their location.

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## Smith, Patricia

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**From:** Capaldo, Stephen  
**Sent:** Wednesday, April 20, 2011 10:42 AM  
**To:** Smith, Patricia  
**Subject:** FW: Program Review Report PRCN: 200810326735

**From:** Mulhare, Michael  
**Sent:** Thursday, December 09, 2010 10:41 AM  
**To:** Heidbreder, Kay; Capaldo, Stephen  
**Subject:** FW: Program Review Report PRCN: 200810326735

Information request, second inquiry

Michael J. Mulhare, P.E., Director  
Office of Emergency Management  
Virginia Tech  
248 Burruss Hall (0195)  
Blacksburg, VA 24061

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University Legal Counsel  
236 Burness Hall (0121)  
Blacksburg, Virginia 24061  
540/231-6293 Fax 540/231-6474

December 10, 2010

U.S. Department of Education  
Office of Management  
Regulatory Information Management Services  
400 Maryland Avenue, SW, LBJ 2W220  
Washington, DC 20202-4536  
ATTN: FOIA Public Liaison

**RE: Request Pursuant to Freedom of Information Act**

To Whom It May Concern:

Virginia Polytechnic Institute and State University ("Virginia Tech") hereby makes this information request pursuant to the Freedom of Information Act ("FOIA"), codified at 5 U.S.C. §552, as amended. Virginia Tech specifically requests copies of the following in relation to the Final Program Review Determination ("Determination"), OPE ID: 00375400, PRCN: 200810326735.

- All investigative notes related to the Determination
- All submissions, with the exception of material previously provided by Virginia Tech, related to the Determination, including but not limited to submissions by Security on Campus, Inc. and representatives of the victims and their families (commented upon per page 5 of the Determination)
- Any and all documents relied upon by the Department of Education in making the Determination and not previously provided by Virginia Tech

This request is not meant to be exclusive of any other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request. In the event that access to any of the requested records is denied, please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. It is further requested that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance.

*Invent the Future*

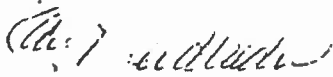
VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY  
*An equal opportunity, affirmative action institution*

ATTACHMENT B

If applicable, please separately state your reasons for not invoking your discretionary powers to release the requested documents.

Virginia Tech anticipates a timely production of these documents. Please contact me if you have any questions.

Sincerely,



Kay Heidbreder  
University Legal Counsel

Cc Mr. James Moore, U.S. Department of Education  
Elizabeth Goldsmith, U.S. Department of Education  
Charles Steger, President, Virginia Tech

## **Capaldo, Stephen**

---

**From:** Capaldo, Stephen  
**Sent:** Tuesday, March 01, 2011 10:40 AM  
**To:** 'Small, Kimberly'  
**Subject:** RE: Requesting extension for FOIA Request: 11-00471-F

Ms. Small-

I wanted to follow up on the progress of Virginia Tech's FOIA request.  
Steve Capaldo

**From:** Small, Kimberly [mailto:Kimberly.Small@ed.gov]  
**Sent:** Monday, January 03, 2011 1:39 PM  
**To:** Capaldo, Stephen  
**Subject:** RE: Requesting extension for FOIA Request: 11-00471-F

Good afternoon Mr. Capaldo,

The offices outside of our metro area would like me to inform you of the following update:

"We will need at least one month to compile everything. We also need the request narrowed down by whomever contacts VA Tech on these issues. Is it that they want the families submissions and the SOC Complaint which we have. I believe from the submission that they don't want their submissions back or the report drafts which would be OGC privileged information. I am trying to narrow this down."

During the process of this request, if there are any further updates I will let you know as they arrive. As always, please feel free to contact me.

Have a good day,

*Kimberly Small*

Freedom of Information Act/Privacy Act Coordinator  
Communications & Outreach  
Phone: (202) 377-3401

"Team knock-out divides the task & multiplies the success!"

**From:** Capaldo, Stephen [mailto:scapaldo@vt.edu]  
**Sent:** Wednesday, December 22, 2010 9:15 AM  
**To:** Small, Kimberly  
**Cc:** Hincker, Larry; Heidbreder, Kay; Smith, Patricia  
**Subject:** RE: Requesting extension for FOIA Request: 11-00471-F

Ms. Small-

Virginia Tech does not have an objection to granting an extension until January 13, 2011, regarding the FOIA response from the Department of Education.  
Steve Capaldo

**From:** Small, Kimberly [mailto:Kimberly.Small@ed.gov]  
**Sent:** Wednesday, December 22, 2010 8:35 AM

**To:** Capaldo, Stephen

**Subject:** Requesting extension for FOIA Request: 11-00471-F

Good morning,

I am requesting an extension until January 13, 2011, the teams need more research time. I am waiting to find out if other departments have any responsive documents on the west coast.

Thank you in advance,

Kimberly Small

Freedom of Information Act/Privacy Act Coordinator

Communications & Outreach

Federal Student Aid

U.S. Department of Education

830 First Street, NE, Room 114H1

Washington, DC 20202-5361

Phone: (202) 377-3401

[kimberly.small@ed.gov](mailto:kimberly.small@ed.gov)

## **Capaldo, Stephen**

---

**From:** Capaldo, Stephen  
**Sent:** Monday, January 03, 2011 1:42 PM  
**To:** 'Small, Kimberly'  
**Cc:** Heidbreder, Kay; Hincker, Larry; Mulhare, Michael  
**Subject:** RE: Requesting extension for FOIA Request: 11-00471-F

Ms. Small-

Thank you for your note.

Virginia Tech wants EVERYTHING that the DOE relied upon in making their determination. This is exclusive of anything Virginia Tech provided to the DOE (no need for redundancy here). This would mean, without limitation, anything provided by families, SOC, investigative notes, etc. Would you like to discuss by telephone?

Stephen Capaldo

**From:** Small, Kimberly [mailto:Kimberly.Small@ed.gov]  
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Phone: (202) 377-3401

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**Capaldo, Stephen**

---

**From:** Capaldo, Stephen  
**Sent:** Tuesday, March 22, 2011 1:55 PM  
**To:** 'EDFOIAManager@ed.gov'  
**Cc:** Small, Kimberly (Kimberly.Small@ed.gov); James.Moore@ed.gov  
**Subject:** FOIA request  
**Attachments:** Document.pdf

Dear Freedom of Information Act Officer:

Please find attached a renewed Freedom of Information Act request by Virginia Polytechnic Institute and State University ("Virginia Tech"). Due to the Department's failure to provide responsive documents per a FOIA request dated December 10, 2010, this is a second request.  
Please let me know if you have questions.  
Stephen Capaldo



March 22, 2011

U.S. Department of Education  
Office of Management  
Regulatory Information Management Services  
400 Maryland Avenue, SW, LBJ 2W220  
Washington, DC 20202-4536  
ATTN: FOIA Public Liaison

**RE: Request Pursuant to Freedom of Information Act**

To Whom It May Concern:

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- All investigative notes related to the Determination
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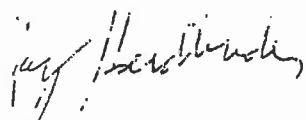
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Sincerely,



Kay Heidbreder  
University Legal Counsel

Cc Mr. James Moore, U.S. Department of Education  
Kimberly Small, U.S. Department of Education  
Charles Steger, President, Virginia Tech